

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

DANIEL E. NAGY, et al.

Plaintiff(s),

vs.

CEP AMERICA, LLC, et al.

Defendant(s).

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) Case Number: 3:23-cv-5648-RS

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) **PLAINTIFFS' MOTION TO LEAVE TO  
FILE SURREPLY IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS**

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Pursuant to Civil R. 7-11, Plaintiffs respectfully submit this administrative motion for leave to file a sur-reply, which is attached hereto as Exhibit B. Plaintiffs' sur-reply is warranted because Defendants introduce new legal argument and authorities in its reply brief. Specifically, Defendants failed to note binding precedent in their initial Motion to Dismiss foreclosing their argument that a plaintiff lacked standing due to a previously-signed release of ERISA claims. In their Reply, Defendants not only re-iterate their contention that in the D.C. Circuit the outcome might go their way, but also that the binding Ninth Circuit precedent in *Bowles v. Reade*, 198 F.3d 753 (9th Cir. 1999) has been usurped by the Supreme Court's 2008 decision in *LaRue v. De Wolff, Borger & Assocs.* 552 U.S. 248, 256 (2008) and *Thole v. U.S. Bank N.A.* 140 S. Ct. 1615, 1620–21 (2020). Not only is that argument new — neither *LaRue* nor *Thole* (nor *Bowles*) appear at all in Defendants' Motion to Dismiss — but there is also no support for their contention that, contrary to the holding in *Bowles*, Mr. Nagy can agree to give up his account's ability to benefit from a Plan-wide recovery. Dkt. 23.

To ensure a complete and balanced record from which the Court may decide the present motion, Plaintiffs seek an opportunity to address Defendants' new legal argument and cases. When a party "raises a new argument or presents new evidence in a reply brief, a court may consider these matters only if the adverse party is given an opportunity to respond." *Banga v.*

1 *First USA, NA*, 29 F. Supp. 3d 1270, 1276 (N.D. Cal. 2014); *El Pollo Loco v. Hashim*, 316 F.3d  
2 1032, 1040–1041 (9th Cir. 2003). Plaintiffs’ Proposed Sur-Reply is limited to this issue and is  
3 less than three pages in length.

4 Pursuant to Civil L.R. 7-11(a), the undersigned counsel sought a stipulation from  
5 Defendants agreeing to the relief requested herein, but opposing counsel did not give their  
6 consent. See Declaration of Mark Boyko, attached hereto as Exhibit A.

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8 Dated: April 15, 2024

Respectfully submitted,

9 /s/ Mark G. Boyko

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